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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 SHERYL L. WEAVER,) CASE NO. C07-0892-JCC
08 Plaintiff,)
09 v.) REPORT AND RECOMMENDATION
10 MICHAEL J. ASTRUE,) RE: SOCIAL SECURITY
Commissioner of Social Security,) DISABILITY APPEAL
11 Defendant.)
12 _____)

13 Plaintiff Sheryl L. Weaver proceeds through counsel in her appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record
17 (AR), and all memoranda of record, it is recommended that this matter be REMANDED for
18 further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1957.¹ She earned a General Equivalency Degree and
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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 attended college for one and a half years. Plaintiff previously worked for two months as a florist.
02 That work ended due to an injury sustained on December 15, 1999, resulting in left lower
03 extremity reflex sympathetic dystrophy, also known as complex regional pain syndrome.

04 Plaintiff filed an application for SSI benefits in October 2003, alleging disability since
05 August 1, 2000 due to chronic complex pain syndrome of the foot and leg, depression, and
06 migraines. (AR 55-58, 101.³) Her application was denied initially and on reconsideration, and she
07 timely requested a hearing. ALJ Verrell Dethloff held a hearing on July 18, 2006, taking testimony
08 from plaintiff. (AR 481-504.) ALJ Dethloff issued a decision finding plaintiff not disabled on
09 September 29, 2006. (AR 13-21.).

10 Plaintiff timely appealed to the Appeals Council, which denied review (AR 6-8), making
11 the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision
12 of the Commissioner to this Court.

13 JURISDICTION

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

15 DISCUSSION

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
18 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
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20 official policy on privacy adopted by the Judicial Conference of the United States. **Plaintiff's**
21 **counsel is advised to refrain from including the month and day of birth in future filings.**

22 ² A previous application, filed in June 2002 (AR 49-52) and denied in July 2002 (AR 31),
was not appealed.

01 engaged in substantial gainful activity since her alleged onset date. At step two, it must be
02 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's reflex
03 sympathetic dystrophy of the left foot severe. He did not find the evidence to support the
04 existence of severe depressive or anxiety disorders. Step three asks whether a claimant's
05 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not
06 meet or equal the criteria for any listed impairment.

07 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
08 residual functional capacity (RFC) and determine at step four whether the claimant has
09 demonstrated an inability to perform past relevant work. The ALJ found plaintiff capable of
10 performing in the sedentary range of physical exertion, with an ability to lift and carry ten pounds
11 occasionally and less than ten pounds frequently, and an ability to stand/walk for two hours and
12 to sit for six hours in an eight hour day. He also found that she had limited use of her left lower
13 extremity, meaning she could not climb ladders, ropes, or scaffolds, could not balance or crouch,
14 and needed to avoid extreme cold, extreme heat, and hazards such as heights and dangerous
15 machinery. With this RFC, the ALJ found plaintiff unable to perform her past relevant work.

16 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
17 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
18 adjustment to work that exists in significant levels in the national economy. Considering the
19 Medical-Vocational Guidelines, the ALJ found plaintiff not disabled. In so finding, he concluded
20 that the additional limitations in the RFC finding had little to no effect on the occupational base
21 of unskilled sedentary work.

22 This Court's review of the ALJ's decision is limited to whether the decision is in

01 accordance with the law and the findings supported by substantial evidence in the record as a
02 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
03 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
04 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
05 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
06 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
07 2002).

08 Plaintiff argues that the ALJ erred in discounting multiple psychological opinions by
09 examining physicians, questioning her credibility, and in failing to accept the opinion of her
10 treating physician. Her arguments imply errors at steps two through five of the ALJ's decision.³
11 Plaintiff requests a remand for an award of benefits or, alternatively, for further administrative
12 proceedings. The Commissioner argues that the decision is supported by substantial evidence and
13 should be affirmed.

14 The Court has discretion to remand for further proceedings or to award benefits. *See*
15 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
16 where "the record has been fully developed and further administrative proceedings would serve
17 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

18
19 ³ In the Briefing Scheduling Order, the Court directed plaintiff to "set forth [her]
20 contentions as to each and every issue raised" in an opening brief. (Dkt. 9.) However, plaintiff's
21 four and a half page opening brief jumbles together all of her arguments in a single section and
22 contains predominantly generalized assertions of error. (Dkt. 11.) She did not submit the optional
reply. **Plaintiff's counsel is advised to raise specific and detailed assignments of error in
future filings with this Court. For instance, should a claimant allege that the ALJ erred in
rejecting a physician's opinion, plaintiff's counsel should identify and discuss the specific
ways in which the ALJ erred.**

01 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
02 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
03 must be resolved before a determination of disability can be made; and (3) it is clear
from the record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

04 *Id.* at 1076-77. As discussed below, the undersigned finds a remand for further administrative
05 proceedings appropriate in this case.

06 Physicians' Opinions

07 In general, more weight should be given to the opinion of a treating physician than to a
08 non-treating physician, and more weight to the opinion of an examining physician than to a non-
09 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
10 by another physician, a treating or examining physician's opinion may be rejected only for "clear
11 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
12 Where contradicted, a treating or examining physician's opinion may not be rejected without
13 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."
14 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). "The opinion of
15 a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection
16 of the opinion of either an examining physician or a treating physician." *Id.* at 831 (citing *Pitzer*
17 *v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and *Gallant v. Heckler*, 753 F.2d 1450, 1456
18 (9th Cir. 1984).) However, "the report of a nonexamining, nontreating physician need not be
19 discounted when it 'is not contradicted by *all other evidence* in the record.'" *Andrews v. Shalala*,
20 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting *Magallanes*, 881 F.2d at 752 (emphasis in original).)

21 Here, plaintiff argues that the ALJ erred in rejecting the opinions of both treating and
22 examining physicians. These arguments entail a direct critique of the ALJ's step three finding,

01 RFC assessment, and conclusion at step five, and implicitly challenge the ALJ's findings at step
02 two.

03 A. Examining Physicians – Mental Impairments

04 Plaintiff points to findings from several examining mental health professionals. She notes
05 that Dr. Kevin Morris, who assessed depressive and anxiety disorders in April 2002, found her
06 markedly limited in several respects, including in the ability to perform routine tasks, to relate
07 appropriately to coworkers and supervisors, to interact appropriately in public contacts, and to
08 respond appropriately to and tolerate the pressures and expectations of a normal work setting.
09 (AR 331-34.) He also noted “very severe physical limitations” and found it “unlikely” that
10 intervention would restore plaintiff's ability to work. (AR 333-34.)

11 Plaintiff next directs the Court's attention to the February 2004 evaluation of Dr. Chris
12 Wilson, who diagnosed her with major depressive disorder and panic disorder with agoraphobia.
13 (AR 345-50.) Considering plaintiff's depression and panic attacks in combination with her chronic
14 pain symptoms, Dr. Wilson found it unlikely plaintiff would be able to perform work activities on
15 a consistent basis. (AR 350.)

16 Finally, plaintiff points to a January 2005 examination by Dr. Ronald Early. (AR 406-16.)
17 Dr. Early diagnosed major depressive disorder, panic disorder with agoraphobia, and anxiety
18 disorder, and found her “totally and permanently disabled” from employment as a result of the
19 combined effects of her pain disorder and the mental health diagnoses. (AR 414-16.)

20 Plaintiff argues that the opinions of these physicians demonstrate that she meets the
21 requirements at step three for two listings – 12.04 (affective disorders) and 12.06 (anxiety-related
22 disorders) – based on her marked restrictions in her activities of daily living, maintaining social

01 functioning, and maintaining concentration, persistence, and pace. She alternatively argues that
02 her depression and anxiety present such severe limitations that a sedentary level of work is beyond
03 her ability.

04 The Commissioner argues that the ALJ properly assessed the opinions of these physicians
05 and relied on contrary opinions and evidence in the record. He rejects the contention that the
06 evidence supports a step three listing-level impairment and avers that the ALJ properly deemed
07 plaintiff's depressive disorder and anxiety disorder not severe.

08 In considering plaintiff's mental impairments, the ALJ found as follows:

09 The medical record has also referred to mental impairments. For instance, Kevin
10 Morris, Psy.D., in completing forms for the Washington State Department of Social
11 and Health Services (DSHS) stated that the claimant had a depressive disorder NOS
and an anxiety disorder NOS, which were both secondary to reflex sympathetic
dystrophy.

12 However, the medical evidence has not shown that any depression or anxiety have
13 adversely impacted the claimant's ability to perform basic work activities. In a mental
14 residual functional capacity assessment of the claimant by William Reade, Ph.D., in
15 March 2004 and a reassessment by Alex Fisher, Ph.D., in May 2004, the claimant's
16 mental status examination findings were described as benign. After studying the
17 medical evidence, these doctors noted that the claimant was only slightly anxious and
only slightly depressed. She was able to drive, shop and go out alone. She
participated in such activities as emailing, fix meals and accomplish what she sets out
to do. Besides her normal activities of daily living, the claimant has no restrictions in
social functioning or adaptation.

18 Although Drs. Reade and Fisher found moderate difficulties in maintaining
19 concentration, persistence and pace in their completion of a psychiatric review
20 technique form (PRTF), they did not provide evidentiary support for this conclusion
in either this document or in the mental residual functional capacity assessment.
Accordingly, the Administrative Law Judge rejects this one conclusion from these
medical consultants.

21 It is true that Dr. Morris listed a host of work-related limitations while filling out the
22 DSHS form in April 2002. However, he did not provide objective medical findings
to support these limitations. Furthermore, Dr. Morris is not a treating source: the

01 claimant only saw this physician once.

02 And it is also true that Chris Wilson, M.D., listed diagnoses of major depressive
03 disorder and panic disorder with agoraphobia after examining the claimant in February
04 2004. Yet, his findings were inconsistent with any mental impairment that would
05 prevent the claimant from performing basic work activities. Dr. Wilson noted the
06 claimant, who was cooperative, had normal speech and cohesive and organized
07 thought. Although the claimant complained about being depressed, she appeared to
08 be only slightly depressed and anxious, Dr. Wilson observed. She was oriented and
09 her memory was intact. Testing showed that the claimant was able to spell "world"
10 forward and backward and that she was able to execute a three step command.

11 Thus, it was inconsistent for Dr. Wilson to declare that the claimant would struggle
12 with the performance of even simple and repetitive tasks and that she was unlikely to
13 perform work activity on a consistent basis in the near future.

14 The Administrative Law Judge also acknowledges that Ronald Early, Ph.D., M.D.,
15 in performing an examination of the claimant in January 2005 concluded that she had
16 a major depressive disorder, a panic disorder with agoraphobia, and an anxiety
17 disorder NOS. Dr. Early also stated that the claimant was ". . . totally and
18 permanently disabled from meaningful and gainful employment as a result of pain and
19 impairments related to her feet in combination with chronic and severe symptoms with
20 her psychological disorders".

21 But once again the conclusions from a doctor do not match the medical findings. In
22 examining the claimant, Dr. Early reported the existence of good social judgment.
And this doctor stated that the claimant exhibited only a mildly constricted affect and
depressive mood and that there was no indication of extreme anxiety.

In 2006, the claimant was distraught and disorientated and agitated, but these
symptoms stemmed from particularly stressful events such as the impending visit of
her boyfriend's troublesome child and the eventual breakup of her relationship with
her boyfriend. The claimant failed to establish any anxiety disorder or any depressive
disorder as a severe impairment.

(AR 15-17; internal citations to record omitted.)

Outside of a general argument that the ALJ erred in discounting the opinions of examining
physicians and a specific argument that those opinions reflect the existence of a listing-level
impairment at step three, plaintiff provides little guidance to the Court as to the ways in which the

01 ALJ allegedly erred.⁴ In any event, the Court finds the ALJ's decision troubling in several
02 respects.

03 First, although plaintiff fails to specifically argue as such, it is questionable whether the
04 ALJ appropriately determined that plaintiff's depression and anxiety disorders were not severe.
05 At step two, a claimant must make a threshold showing that his medically determinable
06 impairments significantly limit his ability to perform basic work activities. *See Bowen v. Yuckert*,
07 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers
08 to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b).
09 "An impairment or combination of impairments can be found 'not severe' only if the evidence
10 establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability
11 to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling
12 (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless
13 claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the
14 "combined effect" of an individual's impairments in considering severity. *Id.*

15 In this case, there was evidence from three examining physicians supporting the severity
16 of plaintiff's mental impairments. Even if the ALJ did not agree that these impairments prohibited
17 plaintiff from working, the medical evidence provided support for the conclusion that they
18 established more than a slight abnormality.⁵ It is also not clear that the ALJ adequately considered

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20 ⁴ *See supra* n. 3.

21 ⁵ Although the failure to find an impairment severe at step two may be considered harmless
22 error where the ALJ considered any associated limitations at step four, *Lewis v. Astrue*, 498 F.3d
909, 911 (9th Cir. 2007), the ALJ in this case did not consider limitations associated with
plaintiff's mental impairments at the fourth step of the sequential evaluation process. (*See AR*

01 these conditions in combination with plaintiff's physical impairments. In contrast, all of the
02 examining physicians discussed the connection between plaintiff's physical and mental
03 impairments. (*See* AR 332-34, 350, 414-16.)

04 Second, the ALJ in this case failed to provide sufficient reasoning for rejecting the opinions
05 of the examining physicians. The ALJ noted that Dr. Morris did not provide objective medical
06 findings and only examined plaintiff once, but relied on the alternative opinions of reviewing
07 physicians who never once examined plaintiff. He also rejected the one finding of those reviewing
08 physicians that supported the existence of limitations related to mental impairments as lacking in
09 evidentiary support, but accepted their other findings without similar criticism. Additionally, Dr.
10 Morris did attach some documentation reflecting testing. (AR 335-43.) It is difficult to read, but
11 this documentation reflects that Dr. Morris found "some difficulties" on testing for short-term
12 memory and noted "[unintelligible] anxious presentation near tears at times." (AR 337, 340.)

13 With respect to Dr. Wilson, the ALJ failed to discuss the fact that this physician's opinion
14 stemmed from his consideration of plaintiff's mental impairments together with her physical
15 impairments. Specifically, Dr. Wilson opined:

16 This claimant likely would struggle with performing even simple and repetitive tasks,
17 not secondary to intellectual difficulties, but because it appears that she is unable to
18 sustain any activity for much time at all, given her chronic pain symptoms. It is likely
19 that she could accept instructions from supervisors and interact quite well with
20 coworkers and the public, but given her chronic pain symptoms, it is unlikely that she
21 will be able to perform work activities on a consistent basis in the near future. It is
22 likely that her symptoms of depression and panic attacks, in addition to her chronic
pain symptoms would make it very difficult for her to maintain regular attendance in
a workplace and her symptoms of agoraphobia related to her panic attacks would also
make it difficult for her to engage in extensive public activities. It is likely that the

18-20.)

01 usual stressors encountered in competitive work would impact her psychiatric
02 condition.

03 (AR 350.) Although Dr. Wilson did observe plaintiff to be only “slightly depressed and slightly
04 anxious” during the interview (AR 348), his conclusions were not necessarily inconsistent with his
05 findings given the above.

06 Lastly, in dismissing Dr. Early’s opinions as not matching his medical findings, the ALJ
07 ignored some of this physician’s findings. The ALJ focused on Dr. Early’s observation of good
08 “social judgment” and “mildly constricted affect and depressed mood[,]” with “no indication of
09 acute anxiety during the course of the evaluation.” (AR 16-17 and 411-12.) However, he made
10 no mention of Dr. Early’s testing results, including plaintiff’s placement in the “severe range of
11 depression[.]” on the Beck Depression Inventory and a valid profile “consistent with diagnoses of
12 both anxiety and depression as well as prominent focus on somatic complaints[.]” on the Million
13 Clinical Multiaxial Inventory III test. (AR 411.) Dr. Early later stated:

14 In today’s evaluation, this lady continues to have symptoms of depression and anxiety,
15 which are clearly evident and documented in the two psychometric test instruments
16 as indicated above. In addition, clinical testing is consistent with a severe depressive
17 disorder. Although she had no acute panic attacks in this evaluation session she was
18 accompanied by her boyfriend who was in the next room and she was in an
19 environment where she would typically feel safe.

20 (AR 413.) Also, considering the combined effects of plaintiff’s physical and mental impairments,
21 Dr. Early indicated there was “overwhelming evidence” supporting the conclusion that plaintiff
22 could not maintain and sustain gainful employment. (AR 415-16.)

21 Given all of the above, the Court concludes that neither the ALJ’s step two decision, nor
22 his evaluation of the examining physicians’ opinions can be said to be supported by substantial

01 evidence. Reversible errors at these steps also requires further assessment at all subsequent steps
02 of the sequential evaluation. For example, plaintiff's RFC would likely be implicated and the ALJ
03 would presumably not be able to rely solely on the Medical-Vocational Guidelines at step five
04 given possible limitations associated with mental impairments. *See, e.g., Tackett v. Apfel*, 180
05 F.3d 1094, 1101-04 (9th Cir. 1999) ("The ALJ may rely on the grids [(or Medical-Vocational
06 Guidelines)] alone to show the availability of jobs for the claimant 'only when the grids accurately
07 and completely describe the claimant's abilities and limitations.'"; where a claimant has a
08 significant limitation not contemplated by the Medical-Vocational Guidelines, an ALJ must call
09 a vocational expert) (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)).

10 However, it does not follow that the opinions of these physicians are appropriately credited
11 as true. *Compare Lester*, 81 F.3d at 830-34 ("Where the Commissioner fails to provide adequate
12 reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that
13 opinion as 'a matter of law.'"; finding that, if doctors' opinions and plaintiff's testimony were
14 credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498,
15 502 (9th Cir. 1989)), *with Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (courts retain
16 flexibility in applying the "'crediting as true' theory."; remanding for further determinations where
17 there were insufficient findings as to whether plaintiff's testimony should be credited as true). The
18 one physician whose opinions clearly support the conclusion that plaintiff meets a listing – Dr.
19 Morris – provided the least amount of supporting information; he completed a form, as opposed
20 to the more extensive evaluation reports from Drs. Wilson and Early. The evaluations from Drs.
21 Wilson and Early are both supportive of an ultimate disability finding, but do not make specific
22 findings as to the criteria for the relevant listings. Moreover, a review of the record as a whole

01 does not support the conclusion that the record is fully developed and a finding of disability clearly
02 required. *See, e.g., Connett*, 340 F.3d at 876.

03 In sum, the undersigned recommends that this matter be remanded for further proceedings.
04 On remand, the ALJ should contact the examining physicians for further information and, if
05 necessary, call his own medical expert in further considering plaintiff's claim.

06 B. Treating Physician – Physical Impairments

07 Pointing to a January 2004 report (AR 372), plaintiff states that her treating physician for
08 her pain syndrome, Dr. Jeffrey Christensen, has consistently indicated that she would not be able
09 to sustain employment. She avers that the ALJ's conclusion that she could perform the physical
10 requirements of sedentary work are inconsistent with both Dr. Christensen's opinion and her own
11 testimony.

12 In considering plaintiff's physical impairments, the ALJ adopted the physical RFC
13 assessment of reviewing physician Dr. Alnoor Virji. (AR 17.) Dr. Virji's assessment was
14 consistent with an ability to perform sedentary work, with added restrictions of an inability to
15 climb ladders, ropes, or scaffolds, or to balance or crouch, and the need to avoid extreme cold,
16 extreme heat, and hazards such as heights and dangerous machinery. (AR 253-58.)

17 In adopting Dr. Virji's findings, the ALJ rejected Dr. Christensen's opinions, stating:

18 . . . In January 2004, this doctor made the following statement:

19 “The patient, on paper, seems capable of sustaining a sedentary job.
20 However, in considering the overall picture, in her current state, where she
21 has spontaneous flares which are only relieved by long periods of rest, Ms.
22 Weaver would not be able to sustain employment”

In other statements, Dr. Christiansen reported that the claimant was “severely limited”
by being unable to lift at least 2 pounds or being unable to stand and that her

01 condition was not under control and was progressive.

02 But this conclusion of an inability to work is contrary to other opinions from this
03 doctor. For instance, podiatrist Christensen reported in March 2003 that the claimant
04 was able to perform at the sedentary level. Three months later, this doctor concluded
05 that the claimant needed training for sedentary work, thereby indicating her ability to
06 perform at that exertional level.

07 Thus, the impression of Dr. Christensen is that he adopted the role of advocate for the
08 claimant, rather than the role of a physician guided by medical findings and tests and
09 reports. His opinion is given little weight.

10 (AR 17-18; internal citations to record omitted.)

11 As asserted by respondent, where the ALJ provides specific and legitimate reasons
12 supported by substantial evidence in the record for so doing, he may rely on the contradictory
13 opinions of non-examining physicians. Indeed, an ALJ must consider the opinions of state agency
14 reviewing physicians. *See* SSR 96-6p (“Because State agency medical and psychological
15 consultants . . . are experts in the Social Security disability programs, the rules in 20 CFR
16 404.1527(f) and 416.927(f) require administrative law judges and the Appeals Council to consider
17 their findings of fact about the nature and severity of an individual’s impairment(s) as opinions of
18 nonexamining physicians and psychologists. [While not bound by them,] they may not ignore these
19 opinions and must explain the weight given to the opinions in their decisions.”) Also, here, the
20 ALJ did point to two possibly contradictory pieces of evidence from Dr. Christensen in the record.
21 (*See* AR 376, 378.)

22 However, it should be noted that the ALJ accepted the opinion of a one-time reviewing
physician over that of plaintiff’s treating physician. Further, the perceived contradictory evidence
from Dr. Christensen is not particularly compelling, or necessarily contradictory, upon close
examination. First, although in a June 2003 chart note Dr. Christensen indicates plaintiff had

01 “reached a point of medical stability” and required training for sedentary work, he one month later
02 noted that plaintiff’s condition had flared, with “much swelling and pain,” associated nausea, and
03 some blistering. (AR 376.) As reflected in a detailed letter Dr. Christensen wrote in relation to
04 plaintiff’s L&I claim, and which the ALJ quoted, he considered that the overall picture reflected
05 “spontaneous flares which are only relieved by long periods of rest,” resulting in plaintiff’s inability
06 “to sustain employment.” (AR 372 (Dr. Christensen added: “Her flare-ups are incapacitating and
07 for this very reason she had to withdraw from her volunteer job at the Evergreen State Fair. At
08 times she could tolerate work activities for no more than two hours and would have to simply go
09 home to recover. Work durability is a strong issue regarding her condition and her ability to work.
10 The patient has demonstrated that she is motivated and able to tolerate baseline levels of intense
11 pain, but reaches levels of pain so severe as to risk worsening damage to her foot. Flares then can
12 develop which can take 7-10 days to recover. At this point her foot posture changes and skin
13 sores occur.”)) Second, on the March 2003 form on which Dr. Christensen indicated plaintiff was
14 capable of exertional work at a sedentary level, he also estimated that she would be unable to
15 perform at least half-time in a normal day-to-day setting for twenty to twenty five weeks and that
16 the estimated date she could be released to work was “undetermined[.]” (AR 378.)

17 Accordingly, as with the examining physicians’ opinions, the ALJ’s assessment of the
18 opinions of Dr. Christensen was insufficient. Again, however, the Court does not find it
19 appropriate to credit Dr. Christensen’s opinions as true. Instead, the ALJ should further consider
20 the opinions of Dr. Christensen on remand.

21 Credibility

22 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to

01 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*
02 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an
03 ALJ must render a credibility determination with sufficiently specific findings, supported by
04 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what
05 testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81
06 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her
07 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."
08 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the
09 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
10 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
11 and third parties concerning the nature, severity, and effect of the symptoms of which he
12 complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

13 At hearing, plaintiff testified that she could not work because she was not reliable, that she
14 could not sit or stand for more than fifteen minutes at a time, that she laid down for hour long
15 periods several times a day, that she experienced headaches, anxiety, and depression, and that she
16 was also now experiencing numbness in her left hand and arm. (*See generally* AR 471-504.) In
17 considering plaintiff's testimony, the ALJ found as follows:

18 After considering the evidence of record, the undersigned finds that the claimant's
19 medically determinable impairments could reasonably be expected to produce the
20 alleged symptoms, but that the claimant's statements concerning the intensity,
persistence and limiting effects of these symptoms are not entirely credible.

21 A number of normal medical findings are present in the record. In June 2001, G. De
22 Andrea, M.D., and Allan Wilson, M.D., reported that the claimant had a symmetrical
gait, as well as a stable ankle to varus/valgus testing. This doctor noted that the
claimant's EMG of the left lower extremity was normal. The claimant has

01 experienced periods of improvement in which her condition is stable or improved or
02 progressing along quite well and in which she is able to ambulate reasonably well.

03 And exacerbations of the claimant's condition are traced to her participation in
04 strenuous activities. According to a chart note from Dr. Christensen in August 2002,
05 the claimant had a flare of her reflex sympathetic dystrophy (RSD) after working at
06 the Stanwood Fair. In May 2005, the claimant complained about severe pain, but also
07 reported that she had been "... doing a lot of gardening."

08 The claimant engages in daily activities that do not support the degree of physical
09 dysfunction that she has alleged. At the hearing, she testified that she uses an exercise
10 bike for five minutes. She also testified that she took her dog for a walk and did
11 projects around her home, although pacing herself in the performance of tasks.
12 During the time in which she alleged she was unable to work, the claimant served as
13 the superintendent of the horticulture department at the Evergreen State Fair in 2003
14 and 2004. In this job, she hired judges, wrote newspaper ads, and ran a contest. As
15 noted earlier in the decision, she also worked at the Stanwood Fair as the
16 superintendent of the dog ring, which required a number of tasks including the hiring
17 of judges. Thus, the claimant has been able to perform many tasks in a work setting
18 during the time in which she alleged she was unable to work.

19 And as early as 1999, the claimant admitted to using a treadmill for 20 to 25 minutes
20 5 days a week, as she pushed herself through the pain.

21 Some degree of exaggeration has been suggested in the medical record. As early as
22 1999, Clayton Brandes, M.D., stated that the claimant's global tenderness seemed
"somewhat out of proportion". And according to Drs. De Andrea and Wilson, there
was a suspicion of functional overlay with giveaway weakness in all movements of the
left foot.

The claimant's own statements indicate that her RSD is within her control. In August
2003, she told Dr. Christensen that she was "... pleased with her ability to control
her disease with her own will".

Her credibility is damaged by her work history. In completing her Work History
Report, the claimant declared that during the past 15 years she had only worked as
a floral superintendent at the Evergreen State Fair for two weeks each year from 1996
to 2001. This job was a volunteer position. She also reported that she had, at times,
cleaned houses from 1998 to 1999. And she worked as a florist at a grocery store
from November 1999 to December 1999.

Thus, the claimant has no work history to speak of. She had barely begun
employment at the QFC store when she had an accident that became the focus of her

01 life. This focus on disability was accompanied by the claimant's dependence on
02 narcotic medications to the extent that she received medications from several different
physicians, leading to her entrance into a treatment program.

03 For all of these reasons, the claimant's testimony was not convincing.

04 (AR 19-20; internal citations to record omitted.)

05 Plaintiff generally challenges the credibility finding, but does not raise any specific
06 arguments. As argued by respondent, the Court concludes that the ALJ provided clear and
07 convincing reasons for not finding plaintiff entirely credible. The ALJ appropriately pointed to
08 inconsistencies between plaintiff's testimony and her conduct, activities, and other evidence in the
09 record. *Light*, 119 F.3d at 792. He also appropriately considered her poor work history, *Thomas*,
10 278 F.3d at 958-59, as well as evidence of exaggeration, *Tonapetyan v. Halter*, 242 F.3d 1144,
11 1148 (9th Cir. 2001). Taken as a whole, therefore, the ALJ's credibility finding withstands
12 scrutiny.

13 However, given the errors described above, the ALJ's credibility assessment is necessarily
14 implicated and will require further consideration on remand. Likewise, on remand, the ALJ should
15 reconsider both plaintiff's RFC and her ability to perform other work in the national economy at
16 step five.

17 CONCLUSION

18 For the reasons set forth above, this case should be REMANDED for further
19 administrative proceedings. On remand, the ALJ should reassess plaintiff's claims, considering
20 the deficiencies outlined in this Report and Recommendation. A proposed order accompanies this

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01 Report and Recommendation.

02 DATED this 12th day of December, 2007.

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04 Mary Alice Theiler
05 United States Magistrate Judge
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